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Taking trauma seriously: critical reflections on the criminal justice process

Louise Ellison (School of Law) University of Leeds, UK

Vanessa E Munro (Law School) University of Leicester, UK

Corresponding Author:

Louise Ellison, School of Law, University of Leeds, LS2 9JT, Email

l.e.ellison@leeds.ac.uk

Taking trauma seriously: critical reflections on the criminal justice process

Abstract

Over the last two decades successive governments in England and Wales have stated a commitment to placing victims of crime at the heart of the criminal justice agenda. A raft of policies and reforming measures have been introduced with the declared aim of improving the experience and treatment of victims within the criminal process. Despite these developments, the Government has recently conceded that the criminal justice process has continued to fall short – whether in relation to helping victims to recover in the aftermath of a crime or supporting them through the stresses of investigation and trial. In this article we argue that applying a trauma-informed lens to evaluate victim-centred initiatives helps to explain the failure of victim policy in England and Wales to fully deliver on its promise. We highlight the barriers that experiences of trauma can present to effective victim participation and the extent to which current trial processes are often liable to exacerbate rather than ameliorate trauma amongst a broad constituency of victims.

Keywords

Victims, trauma, mental health, criminal justice, post-traumatic stress disorder

Over the last two decades, successive governments in England and Wales have stated a commitment to placing victims of crime at the heart of the criminal justice agenda.¹ Though critics have questioned the true motivation behind this policy stance, improving the responsiveness and accessibility of the criminal justice process to those who experience victimisation has been a repeatedly stated objective of reform.² The story to date in this regard has been a mixed one, however. Substantial strides have been made, for example, in the specific context of those designated as vulnerable or intimidated witnesses, where provision has been made with increasing readiness to ensure 'special measures' that alleviate (some of) the stressors associated with giving testimony in court.³ In addition, there has been an important recognition of the standing

¹ Ministry of Justice, *Getting it Right for Victims and Witnesses* London: Ministry of Justice, 2012, Home Office *Justice for All*. Cm. 5563, London: Home Office, 2002.

² For example, many comments have been made about the potential for purported 'victim-focused' reforms and initiatives to mask punitive policies and harsher measures against offenders, while offering few tangible effects or benefits for victims. Ashworth A, Victims' Rights, Defendants' Rights and Criminal Procedure in Crawford A, Goodey J, eds. *Integrating a Victim Perspective within Criminal Justice: International Debates* Aldershot: Ashgate Dartmouth, pp 185-2004. Jackson J, Putting Victims at the Heart of Criminal Justice? *Journal of Law and Society* 2003; 30: 309-26. For further discussion see Hall M, *Victims of Crime: Policy and Practice in Criminal Justice* Cullompton: Willan, 2009, Doak J, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* Oxford: Hart, 2008.

³ Youth Justice and Criminal Evidence Act 1999.

of the victim within criminal proceedings, reflected – amongst other things – in the implementation of improved procedures for updating on the progress of the investigation and prosecution process and the introduction of victim impact statements. At the same time, however, and as the Ministry of Justice has acknowledged in its 2013 Strategy and Action Plan, significant ongoing challenges remain to fully realising the Government's stated objectives of providing appropriate support to victims of crime and improving their experiences of evidence-giving.⁴

Without trivialising the dilemmas that too single-minded a focus on victims may provoke in relation to securing equal access to criminal justice, our aim in this paper is to take seriously the Government's declared commitment to a victim-centred approach, and to highlight the extent to which initiatives that have been designed and implemented under its auspice to date can be seen to at best scratch the surface of what it in fact entails. More specifically, our aim is to draw trauma into the frame; and to illustrate the extent to which, given the pervasiveness of experiences of trauma amongst a wide constituency of crime victims, any system that purports to be victim-orientated needs, as a priority, to pay considerably more attention to the presence and impact of trauma, particularly where it leads to, or would merit, a diagnosis of Post-Traumatic Stress Disorder ('PTSD'). Such a focus, we will argue, inevitably takes us beyond the

⁴ Ministry of Justice, *Transforming the Criminal Justice System, a Strategy and Action Plan to Transform the Criminal Justice System* London: Ministry of Justice, 2013.

parameters that have been set by existing procedural protections, and compels us to engage more empathetically with the barriers that experiences of trauma can present to effective participation, the ways in which it can mitigate against establishing credibility, and the extent to which current trial processes are often liable to increase rather than ameliorate trauma amongst a broad constituency of victims and witnesses. More broadly, it places an obligation on the state to be more 'responsive' in its handling of vulnerable participants in the criminal justice process, to take mental health as seriously as physical health, and to acknowledge the extent to which strategies of crime prevention and investigation bear significant public health ramifications.

In the first part of the paper, we briefly explore the ways in which emotional or psychological reactions to certain stress events manifest as 'trauma' (and the relationship to 'post-traumatic stress disorder' specifically), as well as the existing evidence which illustrates a scale and prevalence of trauma amongst victims of crime that has barely been acknowledged to date by criminal justice policy-makers or practitioners in the UK. Having done so, we devote a considerable amount of our discussion, in the second part, to two key respects in which such pervasiveness of trauma amongst crime victims poses particularly acute, and currently only partially redressed, challenges for the criminal justice process; namely (i) the negative impact of trauma on memory recall and narrative coherence, and its implications for the evaluation of credibility, and (ii) the ways in which criminal procedure – including its

adversarial structure, timescales for trial processing and distrust of therapeutic interventions – may entrench and augment the vulnerabilities of traumatised witnesses. Given the specific procedural and contextual issues that arise in relation to minors, we restrict our discussion to adult victims; but this, of course, is in no way intended to deny that children also experience crime related trauma, nor to trivialise the extent to which participation in criminal proceedings often poses acute challenges for this population.⁵

Of course, the ramifications of applying a trauma-informed lens to criminal justice policy and practice extend well beyond the treatment of victims. This is not a zero-sum game, and it will also have tangible, and often progressive, implications for how many ‘vulnerable’ suspects and defendants are dealt with. Moreover, it will cast light upon the phenomenon of ‘vicarious trauma’ and the complex ways in which engaging with narratives of victimisation and brutality against others can take a psychological toll on

⁵ For further discussion, see, for example, Kletter H, Weems C, Carrion V, Guilt and posttraumatic stress symptoms in child victims of interpersonal violence *Clinical Child Psychology and Psychiatry* 2009; 14:71-83, UNICEF, *Behind Closed Doors The Impact of Domestic Violence on Children* New York: UNICEF, 2006, Kendall-Tackett K, Williams L, Finkelhor D, Impact of sexual abuse on children: A review and synthesis of recent empirical studies *Psychological Bulletin* 1993; 113: 164-180.

police, prosecutors, barristers, judges and – indeed – jurors, which in turn may impact negatively upon their ability to engage with individual cases. Thus, in the third and final part of the paper, we reflect more broadly on the implications of taking trauma seriously within the investigation and prosecution process, highlighting the extent to which it requires a radical transformation of many of the norms, procedures and ‘emotional cultures’ that currently frame the operation of criminal justice in England and Wales.

Though, we accept that, in the final analysis, a fully trauma-driven response may be unachievable, we maintain that greater acknowledgement of the pervasiveness of trauma, the challenges that it presents to accessing justice, and the ways in which participating within the criminal justice process often comes at the cost of an individual’s therapeutic recovery is crucial; and that applying this lens to evaluate the failure of victim-centred initiatives to fully deliver on their promise offers fresh insight and a compelling mandate for further reform. What is more, it opens up to critical reflection the ways in which criminal justice professionals and jurors may be affected by their engagement with, and responsibility for evaluating, the traumatic narratives of others, and highlights the urgent need to promote individual and organisational level strategies for coping with such emotional labour if justice is not to be put in jeopardy.

Part I: the prevalence of trauma within the criminal justice process

A wide variety of experiences can provoke trauma, and psychological reactions to stressful events will vary greatly between individuals, affected by a range of factors including the characteristics of the originating stressor, the individual's personal resilience, prior history of trauma, age, or connection to sources of economic / social / familial support. Nevertheless, it is clear that – for many people - the effects of trauma can be both severe and debilitating. Common responses include feelings of emotional numbness, confusion, shock, shame, anger, and acute anxiety.⁶ In most cases, these responses are short-lived and pass after a few day or weeks. If reactions become so distressing and prolonged that social, occupational or other functioning is impaired, however, a person may be diagnosed with a specific medical condition, 'post-traumatic stress disorder' ('PTSD').⁷ PTSD first appeared in the clinical literature in the third edition of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* ('DSM') in 1980 and has since undergone several modifications to take account of developments in scientific research and clinical

⁶ Van der Kolk B, McFarlane A, Weisaeth L, *Traumatic Stress: The Effects of Overwhelming Experience of Mind, Body and Society* New York: The Guilford Press, 1996.

⁷ Herman J, *Trauma and Recovery: from Domestic Abuse to Political Terror* London: Pandora, 1992, Yule W, *Post-Traumatic Stress Disorders, Concepts and Therapy* Chichester: Wiley, 1999.

experience.⁸ Officially classified as an anxiety disorder for over thirty years, the current version of the DSM notably recasts PTSD as a 'trauma or stress related disorder' and also introduces important revisions to its stressor and symptomatological criteria.⁹ In short, diagnosis according to DSM V is dependent upon a person being exposed to a traumatic trigger - defined to include exposure to actual or threatened death, serious injury or sexual violation. Criminal victimization is thus one example of a potential qualifying traumatic stressor. To meet the criteria, an individual must additionally experience symptoms within four symptom clusters: (i) re-experiencing symptoms, (ii) avoidance symptoms, (iii) negative cognitions and mood, and / or (iv) hyperarousal symptoms. Alongside the DSM, a second set of standards for the diagnosis of mental disorders have been produced by the World Health Organisation - the latest version of these *International Classification of Diseases* guidelines (utilised in the UK by National Health Service clinicians) likewise illustrates the shifting boundaries of diagnostic criteria over time.¹⁰ According to ICD-11, classification of PTSD is composed of three criteria - re-experiencing, avoidance, and perceived current threat. For a diagnosis of PTSD to be appropriate, at least one symptom of each criteria needs to be present for

⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 3rd ed. Washington: American Psychiatric Association, 1980.

⁹ American Psychiatric Association, *DSM-5* Arlington: American Psychiatric Association, 2014.

¹⁰ Eagle G, Kaminer D, Traumatic Stress: Established Knowledge, Current Debates and New Horizons *South African Journal of Psychology* 2015; 45: 22-35.

a period of several weeks after exposure to an 'extremely threatening or horrific event or series of events' and must cause significant impairment in personal, family, social, educational, occupational, or other important areas of functioning.¹¹

There are reasons to be circumspect regarding the diagnostic criteria for PTSD and, more broadly, regarding its propensity to medicalise and pathologise the reactions that it captures.¹² The diagnostic concepts of PTSD remain the subject of continuing controversy and criticism within the broad field of traumatology.¹³ Diagnosis is made by

¹¹ Maercker A, Brewin C, Bryant R, Cloitre M, van Ommeren M, Jones, L, Humayan A, Kagee A, Llosa A, Rousseau C, Somasundaram D, Souza R, Suzuki Y, Weissbecker I, Wessely S, First M, Reed G, Diagnosis and classification of disorders specifically associated with stress: proposals for ICD-11 *World Psychiatry* 2013; 12: 198–206.

¹² For discussion see Moulding N, *Gendered Violence, Abuse and Mental Health: Beyond Trauma* London: Routledge, 2015, Gavey N, Schmidt J, "Trauma of Rape" Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape? *Violence against Women* 2011; 17: 433-456.

¹³ Brewin C, *Post-Traumatic Stress Disorder: Myth or Malady?* New Haven: Yale University Press, 2003, Rosen G, ed. *Posttraumatic stress disorder* Chichester: Wiley, 2004, McNally, R, Can we fix PTSD in DSM-V? *Depression and Anxiety* 2009; 26: 597–600, Summerfield D, The invention of post-traumatic stress disorder and the social usefulness of a psychiatric category *British Medical Journal* 2001; 322: 95–98; McNally R, Progress and controversy in the study of posttraumatic stress disorder *Annual Review of Psychology* 2003; 54:229–52, Hinton D, Lewis-

clinicians and will thus be affected by their own experience of the ways in which people express the effects of victimisation.¹⁴ It is also clear that individuals may experience significant levels of emotional distress but fail to meet the full threshold criteria for a PTSD diagnosis.¹⁵ In what follows, therefore, whilst we focus attention primarily on the potential pervasiveness of PTSD amongst victims of crime, and the ways in which complainants experiencing PTSD may encounter obstacles to credibility and effective participation within the criminal justice process, it is important to bear in mind that, by restricting our analysis to those who meet the inherently limiting and constantly shifting diagnostic criteria of the prevailing DSM or ICD, we may be underestimating both the scale of the problem and the relevance of our claims to others experiencing serious negative emotional and psychological effects in the aftermath of victimisation.

Fernandez R, The cross-cultural validity of posttraumatic stress disorder: implications for DSM-5 *Depression and Anxiety* 2011; 28:783–80, Zoellner L, Rothbaum B, Feeny N, PTSD not an anxiety disorder? DSM Committee proposal turns back the hands of time *Depression and Anxiety* 2011; 28: 853-856.

¹⁴ Shapland J, Hall M, What do we know about the effects of crime on victims? *International Review of Victimology* 2007; 14: 175-217.

¹⁵ Mol S, Arntz A, Metsemakers J, Dinant G, Vilters-van Montfort P, Knottnerus J, Symptoms of post-traumatic stress disorder after non-traumatic events *British Journal of Psychiatry* 2005; 186: 494–499.

PTSD is an extremely distressing and potentially disabling condition. It is common for people who suffer it to experience intrusive 'flashbacks' during which the traumatic experience – including emotional and physical sensations (for example, sounds, smells or tastes) - is vividly relived.¹⁶ Alongside nightmares and emotional numbness, individuals can experience persistent (and often distorted) negative thoughts about themselves and / or the world ("I am bad", "the world is completely dangerous," "the world is unjust and others cannot be trusted," and so on) leading to intense feelings of shame, guilt, fear and despair. Such emotions target the very core of a person's sense of identity and may involve feelings of self-disgust, failure, low self-worth and disgrace, which in extreme cases lead to suicidal thinking.¹⁷ Post-traumatic shame, for example, can cause a person to feel alienated, worthless, and powerless; and is often associated with wanting to hide away, avoid scrutiny or isolate oneself in anticipation of being judged negatively, blamed or disregarded.¹⁸ Those with the disorder will often remain

¹⁶ Joseph S, Williams, R, Yule, *Understanding Post-Traumatic Stress: A Psychosocial Perspective on PTSD and Treatment* Chichester: Wiley, 1997, Briere J, Scott C *Principles of Trauma Therapy: a Guide to Symptoms, Evaluation and Treatment* 2nd ed. California: Sage, 2015.

¹⁷ Wilson J, Drozdek B, Turkovic S, Posttraumatic Shame and Guilt *Trauma, Violence and Abuse* 2006; 7: 122-141.

¹⁸ Rahm G, Renck B, Ringsberg K, Disgust, Disgust Beyond Description: Shame Cues to Detect Shame in Disguise in Interviews with Women who were Sexually Abused During Childhood *Journal of Psychiatric and Mental Health Nursing* 2006 13 100-109, Lee D, Scragg P, Turner S,

hyper-vigilant, 'on guard' and alert for danger, which can be a source of intense distress and panic when faced with real or symbolic reminders of the traumatic event. Moreover, sleep disturbance, poor concentration and increased irritability are commonly reported. Individuals may seek to avoid people, places and situations which bring back memories of the traumatic incident, and this can have a profoundly detrimental effect on employment, familial / social relationships and other aspects of everyday life. Those diagnosed with PTSD are significantly more likely than those without this diagnosis to have other mental health concerns.¹⁹ Indeed, studies point consistently to higher rates of major depression and anxiety disorders amongst those with crime-related PTSD in particular.²⁰ In some instances these conditions pre-date

The Role of Shame and Guilt in Traumatic Events: A Clinical Model of Shame-Based and Guilt-Based PTSD *British Journal of Medical Psychology* 2001; 74: 451-466.

¹⁹ Boudreaux E, Kilpatrick D, Resnick H, Best C, Saunders B, Criminal Victimization, Posttraumatic Stress Disorder and Comorbid Psychopathology Among a Community Sample of Women *Journal of Traumatic Stress* 1998; 11: 665-678.

²⁰ Kilpatrick D, Acierno R, Mental Health Needs of Crime Victims: Epidemiology and Outcomes *Journal of Traumatic Stress* 2003; 16: 119-132, Breslau N, Davis G, Peterson E, Schultz R, A second look at comorbidity in victims of trauma: the posttraumatic stress disorder-major depression connection *Biological Psychiatry* 2000; 48: 902-9.

victimisation, of course, whilst in others additional emotional problems have developed in its wake.²¹

Traumatic stress is, thus, one of a number of (potentially serious) mental health difficulties victims of crime may present with.²² Despite this, the likely prevalence of PTSD amongst the victim population has barely been acknowledged, let alone addressed, by criminal justice policy-makers and practitioners in England and Wales. Empirical studies of the psychological impact of criminal victimisation are relatively recent, first appearing in the 1970s, and have often been restricted in focus to particular offence types. There is now a substantial body of evidence linking rape with a range of potential adverse psychological effects, including PTSD. Rothbaum and colleagues, for example, found that within the first few weeks after the assault, 94% of the female rape victims surveyed met symptomatic criteria for PTSD, and approximately 50% continued to meet these criteria three months later.²³ Reporting a

²¹ The temporal relationship of onset among these disorders is unclear. Traumatic events may increase the risk for multiple types of mental health problems; developing PTSD may create a vulnerability to other forms of psychological difficulties; and / or the presence of other disorders may create a vulnerability to PTSD.

²² Resick P, Psychological Effects of Victimization: Implications for the Criminal Justice System *Crime and Delinquency* 1987; 33: 468-478.

²³ Rothbaum B, Foa E, Riggs D, Murdock T, Walsh W, A Prospective Examination of

similarly high incidence, but this time in a retrospective study, Resnick and colleagues found that 76% of rape victims met the diagnostic criteria for PTSD at some point within a year of the assault.²⁴ It is clear, moreover, that post-trauma reactions associated with sexual violence can be enduring. In one study, researchers showed that PTSD criteria were met by 17% of rape victims, on average, 17 years post-assault.²⁵

While rape has, often for good reason, commanded most research interest in this area, it is apparent that crimes other than sexual assault can also produce lasting psychological harms. Alongside sexual violence, physical injury or threatened violence involving a perceived threat to life are important risk factors in the later development of

Posttraumatic Stress Disorder in Rape Victims *Journal of Traumatic Stress* 1992; 5: 455-475.

²⁴ Resnick H, Kilpatrick D, Dansky B, Saunders B, Best C, Prevalence of Civilian Trauma and PTSD in a Representative National Sample of Women *Journal of Consulting and Clinical Psychology* 1993; 61: 984-991. See also Kilpatrick D, Saunders B, Amick-McMullan A, Best C, Veronen L, Resnick C, Victim and Crime Factors Associated with the Development of Crime-related Post Traumatic Stress Disorder *Behavior Therapy* 1989; 20: 199-214, Acierno R, Resnick H, Kilpatrick D, Risk factors for Rape, Physical Assault and Post-traumatic Stress Disorder in Women *Journal of Anxiety Disorders* 199; 13: 541-563.

²⁵ Kilpatrick D, Saunders B, Veronen L, Best C, Von J, Criminal Victimization: Lifetime Prevalence, Reporting to the Police and Psychological Impact *Crime and Delinquency* 1987; 33: 479-489.

severe trauma reactions. PTSD has been shown to be common among victims of intimate partner violence, and violent offences more broadly.²⁶ For example, Johansen and colleagues conducted a longitudinal survey of individuals suffering (non-domestic) violent crime and found a high prevalence of PTSD (31%) that correlated with severity of injury, perceived life threat and low social support.²⁷ In a study of victims of street robbery, a third of those surveyed were found to be experiencing PTSD symptoms

²⁶ Saunders D, Posttraumatic Stress Symptom Profiles of Battered Women: A Comparison of Survivors in Two Settings *Violence and Victims* 1994; 9: 31-44, Lipsky S, Field C, Caetano R, Larkin G, Posttraumatic Stress Disorder Symptomatology and Comorbid Depressive symptoms Among Abused Women Referred From Emergency Department Care *Violence and Victims* 2005; 20: 645-659, Jones L, Hughes M, Unterstaller U, Posttraumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research *Trauma, Violence and Abuse* 2001; 2: 99-119, Koss M, Herrer V, Lichter E, Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery *Psychology of Women Quarterly* 2003; 27: 130-142, Koss M, Bailey J, Yuan N, Herrera V, Lichter E, Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery *Psychology of Women Quarterly* 2003; 27: 130-142, Pico-Alfonso, M. A. Psychological intimate partner violence: The major predictor of posttraumatic stress disorder in abused women *Neuroscience and Biobehavioral Reviews* 2005; 29: 181–193. Of course sexual violence is frequently a part of victims' experience of domestic violence.

²⁷ Johansen V, Wahl A, Eilertsen D, Weisaeth L, Prevalence and Predictors of Post-traumatic Stress Disorder (PTSD) in Physically Injured Victims of Non-Domestic Violence: A Longitudinal Study *Social Psychiatry and Psychiatric Epidemiology* 2007; 42: 583-593.

three weeks after victimisation, with 15% of victims still severely affected nine months later.²⁸ Meanwhile, a survey of victims of armed robbery found that victims were still experiencing significant post-traumatic stress 6-12 months after the offence.²⁹ High rates of PTSD have also been reported in victims of trafficking who may experience physical and / or sexual violence, or live in fear of harm to themselves and their family members.³⁰ In addition, there is evidence that victims of persistent harassment, which includes threats of harm or actual physical and / or sexual assault, are at risk of developing the disorder.³¹

²⁸ Gale J, Coupe T, The Behavioural, Emotional and Psychological Effects of Street Robbery on Victims *International Review of Victimology* 2005; 12: 1-22.

²⁹ Harrison C, Kinner S, Correlates of Psychological Distress Following Armed Robbery *Journal of Traumatic Stress* 1998; 11: 787-798.

³⁰ Zimmerman C, Hossain M, Yun K, Roche B, Morison L, Watts C, *Stolen smiles: A summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe* London: London School of Hygiene & Tropical Medicine, 2006.

³¹ In a survey of 100 stalking victims, the criteria for a diagnosis of post-traumatic stress disorder were fulfilled in 37% of subjects, Pathé M, Mullen P, The impact of stalkers on their victims *British Journal of Psychiatry* 1997; 170: 12-17. See also Blaauw E, Winkel F, Arensman E, Sheridan L, Freeve A, The Relationship Between Features of Stalking and Psychopathology of Victims *Journal of Interpersonal Violence* 2002; 17: 50-63. Prevalence of PTSD has also been shown to be high in family members and friends of homicide victims. For example, in one study involving immediate family members, 23% reportedly developed PTSD at some point in time

Whilst, collectively, this body of work paints a compelling picture of a marked prevalence of PTSD symptoms and / or diagnosis amongst victims targeted by a broad range of criminal offences, criminal justice policy has failed to engage adequately with its significance. Initiatives framed as 'victim-focussed' have paid insufficient attention to the challenges that struggling with PTSD symptoms can, and often do, pose to victims – whether in terms of coming forward to report the offence, providing an account that others will accredit as coherent and convincing, engaging effectively with the investigation and prosecution process, or taking steps to facilitate and maximise the prospects of their emotional and psychological recovery. Where some recognition has been afforded to 'trauma', moreover, it has typically been ring-fenced within the specific confines of provisions for 'special measures' assistance, which, at best, addresses only a fraction of the challenges and barriers that are likely to be encountered by crime victims who experience PTSD. In the next section, we reflect in more detail on the nature of the obstacles that PTSD-related symptoms can pose to victims of crime, and

following the victim's death. Amick-McMullan A, Kilpatrick D, Resnick H, Homicide as a Risk Factor for PTSD Among Surviving Family Members *Behavior Modification* 1991; 15: 545-559. See also Zinzow H, Rheingold A, Byczkiewicz M, Saunders B, Kilpatrick D, Examining Posttraumatic Stress Symptoms in National sample of Homicide Survivors: Prevalence and comparison to Violence Victims *Journal of Traumatic Stress* 2011; 24: 743-746.

explore the limited extent to which such challenges have been acknowledged, let alone engaged with or responded to, by the criminal justice system in England and Wales.

Part II: the trouble with trauma

PTSD can manifest through a range of diverse symptoms, and can be sparked as a consequence of a variety of different types of event. This fact, combined with the myriad differences in individual levels of resilience exhibited by victims of crime, entails that traumatic stress can influence one's engagement with the criminal justice process in a diversity of ways, presenting challenges that are unique to each context and case. That said, however, there are certain key ways in which it might be anticipated that a victim's experiencing of PTSD could negatively impact his or her ability to participate fully and effectively within the criminal justice process, at least as it currently operates. In this section, we focus on two broad categories of challenge that experiencing PTSD-related symptoms may present to those who report an allegation of criminal victimisation – first, in terms of others' evaluation of that complainant's credibility; and secondly, in terms of his or her ability to engage actively in the investigation and trial process without cost to one's psychological recovery.

Coherence, consistency and credibility

When victims engage with the criminal process, they assume the role of complainant-witness and are required to provide accounts of their experiences to police officers, prosecutors and, if a case reaches court, to judges and jurors – accounts which, in turn, are subject to close scrutiny. Credibility evaluation is generally deemed a matter of ‘common sense’ but researchers have identified a number of so-called credibility ‘markers’ which appear to influence perceptions of witness credibility, both positively and negatively. Studies suggest, for instance, that witness accounts are likely to be perceived as more reliable and trustworthy if they are rich in detail, whereas accounts that are lacking in this regard appear to be viewed with greater scepticism.³² Consistency of evidence over time is also as a key indicator of perceived reliability: where a witness provides reports that contain discrepancies, he or she is less likely to

³² Bell B, Loftus E, Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details *Journal of Personality and Social Psychology* 1989 56: 669- 679, Borckardt J, Spronhge E, Nash M, ‘Effects of the inclusion and refutation of peripheral details on eyewitness credibility’ (2003) 33 J App Soc Psychol 2187; Wells G, Leippe M, How do triers of fact infer the accuracy of eyewitness identifications? Using memory for peripheral detail can be misleading’ *Journal of Applied Psychology* 1981; 66: 682- 687, Strömwall L, Granhag P, ‘How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges’ *Psychology Crime Law* 2003; 9: 19-36.

be regarded as credible. Certainly in court, it is common practice for cross-examining lawyers to quiz witnesses about any gaps in their recollections and to present this as evidence of unreliability. Likewise, trial advocates will routinely seize upon any inconsistency in testimony during cross-examination to suggest that a witness's account cannot be safely believed. Indeed, according to advocacy manuals, this method of impeachment is one of the most damaging, as well as one of the most commonly employed.³³

But subscription to such credibility markers reflects a scientifically dubious correlation between detail and / or consistency and veracity, which can act to the disadvantage of many witnesses who may – for example, as a consequence of their cultural, linguistic or educational background - struggle to construct their narrative accounts in a fashion that accords with these prevailing norms.³⁴ For those who are attempting to relay their experiences whilst in the grips of symptoms associated with PTSD, moreover, the

³³Lubet S, *Modern Trial Advocacy Analysis and Practice* Indiana: National Institute for Trial Advocacy, 2004, Mauet T, *Fundamental of Trial Techniques* Boston: Little Brown and Company, 1980, Evans K, *The Golden Rules of Advocacy* London: Blackstone Press, 1993.

³⁴ See Baillot, H, Cowan S Munro VE, Reason to Disbelieve: Evaluating the Rape Claims of Women seeking Asylum in the UK *International Journal of Law in Context* 2014; 10: 105-139, Cohen J, Questions of Credibility: Omissions, Discrepancies and Errors in Recall in the Testimony of asylum Seekers *International Journal of Refugee Law* 2001; 13: 293-309.

challenges that this presents may become particularly acute. Indeed, research indicates that trauma can produce memories that are fragmented, lacking in specific detail and difficult to position within a linear narrative, which positions them in direct opposition to common notions of what constitutes a 'good' victim account.³⁵ Several explanations have been provided for this, ranging from the release of high levels of stress hormones which disrupt victim's memory storage and retrieval processes, to a psychological tendency to disassociate or 'switch off' during trauma which affects observation and recall of peripheral detail, or subsequent strategies of avoidance that lead to impaired memory performance.³⁶ Moreover, those who experience trauma are more likely to produce inconsistent or incomplete accounts, with recall being provoked piecemeal as a consequence of sporadic cues, often some time after the event and initial reporting.³⁷ Even without the effects of trauma, autobiographical memories are liable to alter on retelling, with some details being lost as memory fades over time

³⁵ Brewin C, 'Autobiographical memory for trauma: Update on four Controversies' *Memory* 2007; 15: 227-248

³⁶ Brewin C, Memory Processes in Post-traumatic Stress Disorder *International Review of Psychiatry* 2001; 13: 159-163, Van der Kolk B, Fisler R, Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study *Journal of Traumatic Stress* 1995; 8: 505-525, Van der Kolk B, McFarlane A, Weisaeth L, *Traumatic Stress: The Effects of Overwhelming Experience of Mind, Body and Society* New York: The Guilford Press, 1996.

³⁷ Herlihy J, Turner S, Asylum Claims and Memory of Trauma: Sharing our Knowledge *British Journal of Psychiatry* 2007; 191:3-4.

whilst repeated recall can bring novel details to mind, but this variability can be exacerbated when trauma enters the frame. Changes in trauma accounts may be related to disassociative symptoms subsiding or the involuntary re-experiencing of intrusive trauma memories in the form of flashbacks, and different trauma memories may be triggered depending on context or – in a forensic or clinical situation, the focus of questioning.³⁸ Accounts may also shift as individuals come to terms with their experiences – thus, for example, a story initially told from a perspective of self-blame may be replaced by a story with a different narrative organisation after a period of reflection and ‘making sense’ of traumatic events.

This reality that trauma memories are more likely to be partial, and fragmented into several key ‘hotspot’ moments which will often be recalled out of sequence, and often only as part of an ongoing and unfolding dialogue or engagement, has been recognised in *Guidelines on Memory and the Law*, produced by the Research Board of

³⁸ Brewin C, The Nature and significance of Memory Disturbance in Posttraumatic Stress Disorder *Annual Review of Clinical Psychology* 2011; 7: 203-227, Hellawell S, Brewin C, A Comparison of Flashbacks and Ordinary Autobiographical Memories of Trauma: Content and Language *Behaviour Research and Therapy* 2004; 42: 1-12, Gilbert J, Fisher R, The Effects of Varied Retrieval Cues on Reminiscence in Eyewitness Memory *Applied Cognitive Psychology* 2006; 20: 723-739.

the British Psychological Society.³⁹ However, it is far from clear that the implications of contemporary scientific understanding of the impact of trauma on memory have been adequately reflected upon by those tasked with evaluating credibility in the criminal justice context. Whilst the extent to which police and prosecutors take due account of the impact of trauma in their credibility assessments has yet to be systematically investigated, the existence of these memory features may well impact negatively on case progression – either because criminal justice personnel regard them as discrediting or anticipate that they will discredit testimony in the eyes of the jury. Though care must be taken in extrapolating across their distinctive probative, procedural and socio-political contexts, there is ample evidence in contemporary asylum decision-making that, notwithstanding routine acknowledgment in training protocols of the prevalence of trauma and of research evidence on its potential impact upon autobiographical recall – an acknowledgement that has yet to be achieved on the same scale in the criminal justice arena – those tasked with evaluating credibility often continue to place undue emphasis upon the existence of omissions or inconsistencies

³⁹ Derived from a review of scientific studies and findings on human memory, these guidelines were compiled with a view to providing those involved in legal work with an accessible and scientifically accurate basis from which to consider issues relating to memory as they arise in legal settings – subject to the important proviso that current theoretical thinking on the topic is at a stage that supports probabilistic but not absolute statements. Conway M, Holmes E, *Guidelines on Memory and the Law Recommendations from the Scientific Study of the Human Mind* London: British Psychological Society, 2010.

in the peripheral detail of claimants' accounts of alleged persecution.⁴⁰ Of course, gaps and inconsistencies in trauma accounts may also be attributable to errors in memory (which, after all is an active rather than passive process, open to external influence and to differential or distorted interpretations over time) or, indeed, deliberate fabrication. It is appropriate that agents of the criminal justice system be alert to such possibilities. But any automatic or uncritical assumption of a complainant's mendacity or mistake which is grounded in the failure of his or her narration of events to conform to preconceived credibility markers grounded in internal coherence, sequential narration or specific detail emerges as profoundly disconcerting when situated appropriately in the substantial research literature evidencing the potentially negative impacts of trauma in general, and PTSD in particular.

In England and Wales, police and prosecutors receive limited mental health awareness training, which could help to promote a better understanding of trauma and its effects. The absence of such provision poses the risk both that some traumatised victims will see their allegations unfairly dismissed on the basis of a misinterpretation of common trauma reactions and that those who struggle to provide a coherent, organised account will be more likely to withdraw from the criminal process for fear of being deemed an

⁴⁰ Baillot, H, Cowan S Munro VE, Reason to Disbelieve: Evaluating the Rape Claims of Women seeking Asylum in the UK *International Journal of Law in Context* 2014: 10: 105-139.

unreliable witness.⁴¹ For those who reach trial, moreover, the risk of their trauma being misconstrued to the detriment of their perceived credibility is arguably more pronounced, given the aforementioned tendency of defence advocates to portray common trauma reactions as abnormal or suspicious. Whilst trial judges receive guidance and training on a range of mental health conditions, including PTSD, jurors – who become the ultimate arbiters of credibility in the prosecution process – receive no equivalent assistance. Given the potential prevalence of trauma amongst victims of criminal activity, and the clear links established in the research literature regarding the presence of PTSD symptoms and adverse effects on autobiographical recall and narration, this is disconcerting. The impact of trauma on recall is not within the ordinary person's knowledge and understanding, and in the wake of the Court of Appeal's decision in *R v Doody*,⁴² there is now precedent for giving jurors information about aspects of trauma where false or misguided beliefs may otherwise distort their decision-making. Thus far, the reach of *R v Doody* has been limited to the specific context of sexual offence trials (not coincidentally an arena in which the keenest

⁴¹ Hardy and colleagues found that sexual offence complainants who viewed themselves as providing less coherent accounts to police as a result of memory fragmentation predicted that they would be less likely to proceed with their legal cases. Hardy A, Young K, Homes A, Does Trauma Memory Play a Role in the Experience of Reporting Sexual Assault During Police Interviews? An Exploratory Study *Memory* 2009; 17: 783-788.

⁴² *R v Doody* [2008] EWCA Crim 2394.

attention has been given, to date, to the incidence of PTSD amongst complainants and the need for additional protections for ‘vulnerable witnesses’). While its facts were focussed upon the complainant’s delayed reporting, moreover, the Judicial College specimen directions crafted in its wake have been designed to extend to a broader range of ‘counter-intuitive’ behaviours, and include a recognition of the effect that trauma associated with the rape can have on memory and recall.⁴³ Having paved the way for this more expansive approach, we would argue that the Judicial College’s basic acknowledgment – that guidance ought to be given, in a suitably balanced tone that reflects widely acknowledged and uncontroversial research findings, to ensure that jurors can approach evidence “without being hampered by any unwarranted assumptions”⁴⁴ – applies with equal weight to non-sexual offences where the complainant (and indeed witnesses more broadly) experience PTSD-related symptoms that produce counter-intuitive behaviours that might otherwise too easily be attributed by jurors to incredibility. Though in many senses a logical extension of recent innovations in sexual offence cases, this constitutes a tangible way in which the adoption of a trauma-informed lens can ensure a more informed and appropriate response to **all** criminal complainants.

⁴³ Judicial Studies Board, *Crown Court Bench Book, Directing the Jury* London: Judicial Studies Board, 2010.

⁴⁴ Judicial Studies Board, *Crown Court Bench Book, Directing the Jury* London: Judicial Studies Board, 2010, p 357.

Of course, specific care would also need to be taken in the tone, context and wording of any such guidance to ensure that the existence of a PTSD diagnosis is not presented to, or taken by, jurors as in itself offering any kind of corroboration of the complainant's allegations. PTSD symptomatology is not offence-specific and a PTSD diagnosis does not carry any necessary implications regarding the causes of an individual's disorder. Thus, the development of symptoms of PTSD in persons claiming to have been the victim of a crime can only be said to be consistent with their having experienced a major stressor, of which the crime event is a potential example.⁴⁵ Making this clear is crucial, both to ensure fairness to the defendant and to avoid the kind of intrusive questioning of the complainant that would otherwise inevitably ensue from a defence barrister intent on establishing that the PTSD could be attributable to previous traumatic incidents unrelated to the alleged offence. Of course, insisting that the relevance of any PTSD diagnosis be restricted to its potential impact upon post-assault behaviour and / or recall, will not in itself insulate complainants from other lines of questioning pursued by defence counsel within the adversarial process; and it is to the difficulties and dilemmas which this presents, when viewed through the lens of trauma, that we will now turn.

⁴⁵ Freckelton I, When Plight Makes Right: The Forensic Abuse Syndrome *Criminal Law Journal* 1994; 18: 29-49.

Participation, intervention and recovery

It is well-established that the adversarial structure of the criminal justice process in England and Wales can present a challenging environment for its lay participants, and this may be particularly the case for complainants who enter the arena affected by trauma or other vulnerabilities. Indeed, as Judith Herman has put it: “if one set out by design to devise a system for provoking intrusive post-trauma symptoms, one could not do better than a court of law.”⁴⁶ Recounting the detail of a traumatic event goes against characteristic effects of avoidance and is likely to occasion an intense negative emotional reaction for complainants or witnesses experiencing PTSD. Some may experience flashbacks to the incident that cause significant disorientation and confusion, as well as acute fear and distress, whilst in the witness box.⁴⁷ Meanwhile, for others, the pressurised environment of the courtroom may provoke additional disassociation that is experienced as a ‘dream-like’ state, which makes concentration and communication more difficult. Post-traumatic shame or guilt may also render a witness particularly sensitive to negative insinuations made during questioning about his or her character, motivation or behaviour. Moreover, even where the questioning

⁴⁶ Herman J, *Trauma and Recovery, from Domestic Abuse to Political Terror* London: Pandora, 1992, p 72.

⁴⁷ Mason F, Lodrick Z, Psychological Consequences of Sexual Assault *Clinical Obstetrics and Gynaecology* 2013; 27: 27-37.

does not require a detailed rehearsal of the triggering event or betray a tone of suspicion or blaming, the very design and ambience of the adversarial hearing itself “can and frequently does replicate non-specific cues such as the trauma dynamics of powerlessness, betrayal and stigmatisation.”⁴⁸

Whilst alternatives to an adversarial process do exist, its entrenchment within the criminal justice process in England and Wales entails that it is unlikely to be abandoned. It is unclear, moreover, that any shift towards a more inquisitorial model would necessarily produce improvements in the experience of traumatised complainants. Indeed – and, again, with caution in the extrapolation – in the asylum tribunal context, where a non-adversarial approach is at least formally adopted, evidence attests to substantial levels of re-traumatisation as a consequence of intrusive, inappropriate and insensitive questioning and the ongoing presence of combative and hierarchical power structures.⁴⁹ But this is not to say that there are not important mechanisms through which the re-traumatising propensities of the adversarial structure could be mitigated, particularly in their application to complainants who experience post-traumatic stress symptoms. In this section, we focus on three

⁴⁸ Advocate’s Gateway, Toolkit 18 Working with Traumatized Witnesses, Defendants and Parties <http://www.theadvocatesgateway.org/> (2015, accessed 1 March 2016)

⁴⁹ Baillot H, Cowan S. and Munro V, Reason to (Dis)believe? Evaluating the Rape Claims of Women Seeking Asylum in the UK *International Journal of Law in Context* 2014 10(1): 105-139

particular areas of concern, in relation to which the Government has indicated a willingness to reform, but where considerable improvement is still required if it is to follow through in earnest on its commitment to meeting victims' needs. The first relates to the means through which evidence is given and the creation of 'special measures' to facilitate the process of providing testimony; the second concerns the content and tone of cross-examination and the introduction of pre-trial management to limit intrusive questioning; and the third relates to the timescales for processing justice and the current tension that exists for PTSD-diagnosed victims between securing a conviction and pursuing their own psychological recovery.

Supporting best evidence-giving

Provisions originating in the Youth Justice and Criminal Evidence Act 1999 have afforded, with increasing regularity, those deemed to be 'vulnerable or intimidated' witnesses access to a range of additional protections – including, for example, use of screens, live-links, video-taped evidence-in-chief, or removal of wigs and gowns - designed to ameliorate (some of) the stresses associated with evidence-giving in the adversarial trial context. While the influence upon jurors of the complainant's use of such special measures has been a source of concern amongst police and prosecutors,

their availability has been well-received, on the whole, by complainants and witnesses, who maintain that it enabled them to give evidence that they would not otherwise have been prepared or able to give.⁵⁰ At the same time, however, there are concerns about the reach and operation of these special measures, which become particularly evident when the current process is viewed through a trauma-based lens. More specifically, whilst witnesses affected by trauma are eligible for special measures, so long as they can satisfy the court that the quality of their evidence is likely to be diminished either by reason of a mental disorder (which is defined to include PTSD) or by reason of fear or distress in connection with testifying, this process of qualification takes place in a context in which (i) police and prosecutors receive limited training on mental health issues and (ii) the types of trauma-related symptoms experienced may be so pervasiveness amongst the general population of crime victims as to become normalised. As a consequence, the ability of criminal justice personnel, support workers, and indeed the complainant his- or herself, to accurately identify emotional and psychological difficulties experienced in the aftermath of victimisation as indicative of PTSD, and to offer / request special measures protections, is potentially limited. Furthermore, for those who are appropriately recognised as entitled to special

⁵⁰ Hamlyn B, Phelps A, Turtle J, Sattar G, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*. Home Office Research Study 283 London: Home Office, 2004, Burton M, Evans R, Sanders A, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* London: Home Office, 2006.

measures protections, research highlights that complainants – and those experiencing PTSD are no exception - are often not offered, nor provided with, the measures that they believe would help them most. There is evidence that the provision of support can be seriously hampered by a failure to consult with complainants about their specific concerns or individual requirements, and to adequately explain how specific measures operate in practice, leading to misplaced expectations and distress when measures do not adequately meet complainants' needs.⁵¹ In addition, the assistance that is offered is all too often offered at a late stage – sometimes not until the day of a court appearance – exposing witnesses to uncertainty and unnecessary anxiety as they prepare to give their testimony; and the technical challenges posed can result in postponements that further amplify the emotional toll on witnesses.⁵²

Without trivialising the benefits that the use of special measures can afford to complainant-witnesses, it is clear, moreover, that – even when offered appropriately

⁵¹ Hunter G, Jacobson J, Kirby A, *Out of the Shadows* London: Victim Support, 2013.

⁵² Burton M, Evans R, Sanders A Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales *International Journal of Evidence and Proof* 2007; 11: 1-23, McLeod R, Philpin C, Sweeting J, Evans R *Court experiences of adults with mental health conditions, learning disabilities and limited mental capacity Report 2: Before Court Ministry of Justice Research Series 9/10* London: Ministry of Justice, 2010, Smith O, *Court Responses to Rape and Sexual Assault in the UK* Bath: Institute for Policy Research, 2015.

and applied effectively – such protections only reflect one element of what a trauma-informed criminal justice response entails. Though they may operate to reduce stress associated with testimony-giving, research indicates that complainants who use special measures still experience acute anxiety at the thought of chance encounters with the defendant and others involved in the case in the communal spaces of the court building.⁵³ While this could be attenuated by having separate entrances and exits from the court building for complainants, or by greater use of ‘remote courtroom links’ for vulnerable witnesses,⁵⁴ as the following sections will discuss, additional factors associated with the broader process of trial involvement, such as the length of time to be waited before the hearing, a lack of familiarisation with the court environment and the overall adversarial character of proceedings – and in particular the dynamics of cross-examination - continue to cause concerns.

Contending with cross-examination

⁵³ Jacobson J, Hunter G, Kirby A, *Inside Crown Court, Personal Experiences and Questions of Legitimacy* Bristol: Policy Press, 2015.

⁵⁴The Home Office has funded several remote video suites to date, including facilities in Northumbria, Kent and Greater Manchester. See, for example, http://www.northumbria.police.uk/news_and_events/latest_news/2016/02/04/one_of_the_countrys_first_remote_evidence_suites_launching_today/ (accessed 30 March 2016).

Of all the sources of anxiety that weigh on the mind of a complainant as they proceed through the criminal justice process, the prospect of undergoing cross-examination is paramount.⁵⁵ In an adversarial system, such questioning may involve an attack on a witness's character in order to undermine her credibility and / or an interrogation of highly personal aspects of her private life. It is widely acknowledged that the experience of cross-examination can be a highly stressful one, even for professional witnesses (e.g. police officers and experts). Despite this, extended discussion of the ways in which the additional stress associated with, and the experience of undergoing, cross-examination might exacerbate trauma or undermine the quality of evidence that a witness experiencing PTSD is able to give has been markedly absent, until recently at least, from criminal justice debates around trial and proof processes in England and Wales. This omission is striking in a context in which there is ample evidence of the extent to which, for those who are already emotionally or psychologically vulnerable, cross-examination can reinforce feelings of shame, powerlessness, or self-recrimination.

⁵⁵ Hunter G, Jacobson J, Kirby A, *Out of the Shadows* London: Victim Support, 2013, Rock P, *The Social World of the an English Crown Court* Oxford: Oxford University Press, 1993.

This is, however, an area in which there has been some promising activity in recent years. In a series of judgments, the Court of Appeal has placed a renewed emphasis on judicial responsibility for protecting witnesses from improper or unduly distressing cross-examination,⁵⁶ whilst taking the additional step in *R v Lubemba* of directing that 'ground rules hearings' should be held as a matter of course in all cases involving a vulnerable witness.⁵⁷ The primary focus of such hearings to date has been on planning questioning to minimise the use of complex vocabulary and question forms that have been shown to have an adverse effect on witness accuracy, or on avoiding needlessly prolonged and repetitive questioning in cases involving multiple defendants.⁵⁸ However, the *Lubemba* judgment makes it clear that associated matters relating to the general care of the witness, and in particular when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of

⁵⁶ *R v B* [2010] EWCA Crim 4, *R v W* [2010] EWCA Crim 1926, *R v Wills* [2011] EWCA Crim 1938, *R v Jonas (Sandor)* [2015] EWCA Crim 562. For discussion see Henderson E, All the Proper Protections –the Court of Appeal Rewrites the Rules for the Cross-examination of Vulnerable Witnesses *Criminal Law Review* 2014 2, 93-108, Henderson E, Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people *Criminal Law Review* 2016; 3, 181-205.

⁵⁷ *R v Lubemba* [2014] EWCA Crim 2064.

⁵⁸ Cooper P, Backen P, Marchant R, Getting to grips with ground rules hearings: a checklist for judges, advocate and intermediaries to promote the fair treatment of vulnerable people in court *Criminal Law Review* 2015; 6: 420-435.

questioning and frequency of breaks and the nature of the questions to be asked, can also be discussed and agreed upon at this ground rules stage. To the extent that this empowers and encourages trial judges to take a more proactive role in protecting witnesses from unnecessary and oppressive questioning, by setting clear parameters for cross-examination in advance of trial, it is to be welcomed. Moreover, it can be situated alongside further recent insistences by the Court of Appeal and Bar Council on the duty of barristers to treat vulnerable witnesses with due consideration,⁵⁹ as well as the launch of a series of ‘toolkits’ by the Advocates’ Training Council, which set out common problems encountered when examining vulnerable witnesses and defendants, together with suggested solutions. These notably include Toolkit 18, ‘Working with Traumatised Witnesses, Defendants and Parties’, which contains dedicated information about the effects of trauma, trauma triggers and practical steps to support those affected by trauma in the criminal justice process, including through cross-examination, where it is noted that “feigned aggression, mocking and stigmatisation can be powerful triggers”.⁶⁰

⁵⁹ Advocacy Training Council, *Raising the Bar: The Handling of Vulnerable Victims, Witnesses and Defendants in Court*, London: Advocacy Training Council, 2011.

⁶⁰ Advocate’s Gateway, *Toolkit 18 Working with Traumatised Witnesses, Defendants and Parties* <http://www.theadvocatesgateway.org/> (2015, accessed 1 March 2016).

On the other hand, however, such developments will only result in on-the-ground improvements in the treatment of vulnerable witnesses (and, indeed, defendants) if it is taken up enthusiastically. Doing so not only requires a significant shift in the prevailing culture of cross-examination, but also a level of pre-emptive agenda-setting by the judge that sits somewhat at odds from the conventional adjudicative role, commonly characterised within an adversarial process as one of impartial umpire. Experience from more targeted initiatives designed to limit scope for intrusive and potentially re-traumatising cross-examination of complainants in sexual offence trials in England and Wales may not give much cause for optimism. Whilst provisions have been formally introduced to restrict the inclusion of questioning around a complainant's previous sexual history, evidence on this topic continues to find its way into the courtroom with marked frequency, either as a consequence of generous interpretation of the 'gateways' for inclusion or as a result of defence counsel's (tolerated) disregard of the restrictions.⁶¹ Moreover, studies have consistently illustrated how, in the wake of the tightening of provisions governing sexual history evidence, the strategies of harsh cross-examination and complainant impeachment deployed by defence counsel have typically remained unaffected, with the substantive focus shifting from her sexual

⁶¹ Kelly L, Temkin J, Griffiths S, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* London: Home Office, 2006.

behaviour to other aspects of her personal history or lifestyle that tarnish her reputation, and thus credibility, in the eyes of the jury.⁶²

In a context in which the combative culture of the adversarial trial environment may, in practice, prove harder to shift, an alternative means by which to ameliorate (some of) the anticipatory stress associated with the trial, which may be felt particularly acutely by those experiencing PTSD, would be to focus attention on better preparing complainants and witnesses on what to expect during cross-examination. The need for this is poignantly illustrated by the case of Frances Andrade who, with a history of suicide attempts, took a fatal overdose days after giving evidence against her childhood abuser: according to the Coroner at her inquest, she was “extremely

⁶² See for example, Bronitt S, McSherry B The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the “Rape Shield?” *Criminal Law Forum* 1997; 8: 259-291, Temkin J, Digging the Dirt- Disclosure of Records in Sexual Assault Cases *Cambridge Law Journal* 2002; 61: 126-145, Smith O, *Court Responses to Rape and Sexual Assault: An Observation of Sexual Violence Trials PhD Thesis, University of Bath, 2013* http://ww2.anglia.ac.uk/ruskin/en/home/faculties/alss/deps/hss/staff0/olivia_smith/olivia_smith_research.Maincontent.0010.file.tmp/olivia_smith_thesis.pdf [Accessed 1 March 2016], Zydervelt S, Zajac R, Kaladelfos A, Westera N, Lawyers’ Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s? *British Journal of Criminology* 2016 doi: 10.1093/bjc/azw023.

traumatised” after a cross-examination in which she was accused of being a liar, a fantasist and an attention-seeker.⁶³ She reportedly met the prosecutor for the first time just ten minutes before she testified and had no idea that she would be expected to answer personal questions during her testimony nor that she would be required to withstand a defence case that she was lying: “this all meant that during the case she was unfamiliar with the process, unsure of what either barrister was trying to do and exceptionally uncomfortable throughout the entire thing”.⁶⁴ Tragically, we will never know what difference it would have made to Frances Andrade, but there is reason to suspect that preparing witnesses more effectively for the ‘emotional triggers’ that they are likely to face in court – for example, defence accusations of fabrication, being confronted with photographic evidence of injuries, being questioned about their sexual or psychiatric history – would reduce the chances of them being emotionally overwhelmed and re-traumatised during trial questioning.

This is an area in which there has also been some progressive development in recent times in England and Wales, with the CPS announcing in 2015 that it will push ahead

⁶³ Victims need to be treated more fairly, says DPP in wake of Frances Andrade death *The Telegraph* 24 July 2014.

⁶⁴ Violin teacher Frances Andrade 'let down by court system' <http://www.bbc.co.uk/news/uk-england-21387399> (9 February 2013, accessed 1 March 2016).

with plans to issue guidance in which it is acknowledged that prosecutors have an important, and legitimate, role to play in reducing a witness's apprehension about going to court, familiarising them with the processes and procedures – which often seem alienating and intimidating – and managing their expectations on what will happen in the courtroom itself.⁶⁵ Crucially, this guidance confirms that prosecutors may – without fear of allegations of coaching – explain the role of the defence advocate, and in particular that it is their job to put their client's case, of which a crucial component will often involve directly challenging the prosecution's version of events by suggesting that the witness is lying, mistaken or unreliable. Moreover, it advises that witnesses should be informed about any disclosure of third party material that has been made to the defence, for example their medical or counselling records, and advised if the court has granted leave for them to be questioned about their previous sexual history or an aspect of their 'bad character'.⁶⁶

While these initiatives are to be welcomed for their recognition of the ways in which the trial process can replicate victim experiences of acute stress and powerlessness, and the provision of pre-trial preparation certainly offers an important way in which to

⁶⁵ Crown Prosecution Service, *Consultation on Speaking to Witnesses – Summary of Responses* London: Crown Prosecution Service, 2015.

⁶⁶ Crown Prosecution Service, *Consultation on Draft Guidance Speaking to Witnesses at Court* London: Crown Prosecution Service, 2015.

mitigate the damage that this might cause in terms of re-traumatisation (even within the largely unchanged parameters of the adversarial trial environment), its translation into practice continues to present significant challenges. Careful consideration will need to be given to the implementation of these practices, so as to ensure that prosecutors engage with witnesses in a suitably empathetic manner, guided in their dealings with them by adequate training and understanding of the effects of trauma, and do not, for example, first mention the defence's access to their psychiatric records at a point in proceedings (e.g. the day of the trial or shortly before) at which it merely provides an additional level of distress that – ironically - prevents them from being able to give best evidence. Akin to the 'special measures' discussed above, then, these initiatives, which are designed to manage the tone of the trial process, and / or prepare witnesses for those excesses of adversarialism that cannot be managed, could serve either to attenuate or to compound the stress associated with evidence-giving, which will often be felt keenly by those experiencing PTSD; and much depends on the extent to which those tasked with implementation adopt a trauma-informed lens.

Managing justice and recovery

Beyond the specific question of the treatment received by the complainant from defence counsel, or the mechanisms through which she or he is enabled to provide

testimony within court proceedings, there are a range of ancillary factors associated with the broader process of handling criminal cases that might be improved by applying a 'trauma lens' – in particular, we focus here on the question of timescales for securing justice and its specific implications for complainants experiencing PTSD.

While successive governments have pledged to tackle the perennial problem of delay within the criminal process, the average time from offence to completion for cases heard in the Crown Court in England and Wales still stands at over 10 and a half months; and the most serious (indictable) offences where a defendant pleads not guilty typically take more than a year from offence to completion. Indeed, Victim Support has highlighted that the Crown Court is now taking longer than at any point in the past 15 years to process cases and the backlog of cases is increasing rapidly.⁶⁷ For any complainant (or defendant) the protracted nature of the prosecution process is problematic, and the associated sense of one's life being 'on hold' pending the agency of others is liable to have a detrimental impact upon psychological and emotional well-being. Added to this, as acknowledged by Lord Justice Leveson in his recent review of efficiency in criminal proceedings, the frequent (multiple) adjournments of trials means

⁶⁷ Rosetti P, *Waiting for justice: how victims of crime are waiting longer than ever for criminal trials* London: Victim Support, 2015.

that complainants will often experience the anticipatory stress and preparation regarding testifying, only to be sent home to prepare again at a later date.⁶⁸

For those who enter the criminal justice process already experiencing PTSD symptoms, these delays have additional ramifications, entailing that complainants must postpone enlistment in therapies that involve talking about the offence for fear of evidence contamination. In line with guidance jointly produced by the Home Office, CPS and Department of Health, complainants may enlist support that focuses on improving their self-esteem or that aims to reduce the distress associated with impending legal proceedings.⁶⁹ The same guidance, however, warns that any discussion of the evidence that the individual or other witness will give, or the specific substance of the alleged offence itself is off-limits. Indeed, in stark terms, the guidance states that any intervention entailing detailed recounting of the offending behaviour may be regarded as witness coaching and the criminal case will be “almost certain to

⁶⁸ Rt Hon Sir Brian Leveson, *Review of the Efficiency of Criminal Proceedings* <https://www.judiciary.gov.uk/the-president-of-the-queens-bench-divisions-review-of-efficiency-in-criminal-proceedings/history-of-the-review> (2015, accessed 1 March 2016). In 2014, only half of Crown Court trials went ahead on the scheduled date.

⁶⁹ Crown Prosecution Service, Department of Health, Home Office, *Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal trial – Practice Guidance* London: CPS, 2001.

fail as a consequence of this type of therapeutic work”.⁷⁰ Yet this imperative of non-intervention can be juxtaposed against National Institute for Clinical Excellence (‘NICE’) guidelines which specifically identify ‘trauma-focused’ therapy, which involves helping a person come to terms with what has happened to them by working through the traumatic memory and discussing its personal meaning, as the most effective treatment to assist the recovery of those diagnosed with PTSD; and which recommend that this type of therapy commence within 3 months of the initial stress event for those presenting with trauma symptoms and within one month for those with severe PTSD.⁷¹

⁷⁰ Crown Prosecution Service, Department of Health, Home Office, *Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal trial – Practice Guidance* London: CPS, 2001, para11.11.

⁷¹ National Institute of Clinical Excellence, *Post-traumatic Stress Disorder: The Management of PTSD in Adults and Children and Primary and Secondary Care, National Clinical Practice Guideline Number 26* London: Gaskell and the British Psychological Society, 2005. Research suggests that early trauma-focused cognitive behavioural therapy can prevent chronic post-traumatic stress disorder and has been found to be more effective than other types of counselling. Roberts N, Kitchiner N, Kenardy J, Systematic review and meta-analysis of multiple-session early interventions following traumatic events *The American Journal of Psychiatry* 2009;166: 293-301, 216. Kornor H, Winje D, Ekeberg O, Early trauma-focused cognitive-behavioral therapy to prevent chronic post-traumatic stress disorder and related symptoms: a systematic review and meta-analysis *BMC Psychiatry* 2008; 8:81. For further discussion from a clinical perspective see Smith G, Heke S, *From Report to Court: Psychology*,

This presents complainants with an impossible dilemma – either seek prompt therapeutic treatment which could aid their long term recovery or postpone treatment for a year or more, experiencing distressing and debilitating symptoms in the meantime, in order to pursue a prosecution.⁷²

Taking trauma seriously in the context of criminal justice policy-making highlights the intimate nature of what is at stake for vulnerable individuals who are required to postpone therapeutic treatment and compels fresh consideration of how proceedings – or at least the complainant's involvement therein – might be expedited to render the receipt of treatment permissible. One avenue by which this could be pursued, currently being piloted in England and Wales, involves the introduction of pre-recorded cross-

Trauma and the Law Workshop presented at the UK Psychological Trauma Society 3rd Annual Conference; January 2010 <https://www.ukpts.co.uk> (accessed 1 March 2016).

⁷² Concerns have been raised about police and prosecutors reportedly telling victims and witnesses that they must delay therapy until after criminal proceedings. To the extent that this occurs, it is against official guidance which makes clear that it is not a decision for the police or prosecutors whether a vulnerable witness receives therapy but one that can only be taken by the witness in conjunction with the professionals from the agencies providing support to the witness. Crown Prosecution Service, Department of Health, Home Office, *Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal trial – Practice Guidance* London: CPS, 2001, para 4.2.

examination, which would allow those most severely affected by trauma to give their evidence several months ahead of trial in the form of video testimony. While the pilot has focussed upon child witnesses, subject to satisfactory results from that evaluation and an adequate investment in resources, this facility *could* be made available in due course to witnesses who are vulnerable on account of a ‘mental disorder’ (including PTSD), thereby facilitating timely access to effective therapeutic support for a far wider witness population.⁷³

More broadly, of course, adoption of a consciously trauma-informed lens in this context would also cast light upon the widely acknowledged, and much lamented, lack of counselling and emotional support for victims of crime in general, and those experiencing PTSD in particular. In her 2009 report, then Victims’ Champion, Sara Payne, noted that a “desperate lack of counselling provision for victims of crime” was an almost universal theme throughout her consultation with victims and survivors;⁷⁴ a concern further attested to by Victim Support which highlights the considerable geographical differences across the country in the availability of, and access to, such

⁷³ The Government has pledged to complete the national roll out of pre-trial cross-examination for *child victims* by March 2017, subject to the evaluation of the pilots. Ministry of Justice, *Our Commitment to Victims* London: Ministry of Justice, 2014.

⁷⁴ Payne S, *Redefining Justice, Addressing the Individual Needs of Victims and Witnesses*, London: Ministry of Justice, 2009.

assistance.⁷⁵ Whilst the introduction of Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs) undoubtedly provided improvement, with valuable support now being offered to many complainants of sexual violence and domestic violence, complainants of other offences who are likely to be severely affected by trauma are significantly less likely to benefit from similar emotional and practical support.⁷⁶ This is not to downplay the much-valued assistance provided by Victim Support and the Witness Service to such victim-witnesses, but to acknowledge that their staff and volunteers are not typically trained to provide the type of specialist emotional support that would potentially most benefit this complainant population.⁷⁷

⁷⁵ Victim Support, *Criminal Neglect: No Justice Beyond Criminal Justice* London: Victim Support, 2002.

⁷⁶ These are victim-focused advocates who are funded to work with victims of serious sexual crimes and domestic violence to enable them to access services they need in the aftermath of abuse, and to support them through the investigation and court process. Robinson A, *Independent Sexual Violence Advisors: a Process Evaluation* London: Home Office, 2009, Howarth E, Stimpson L, Barran D, Robinson A *Safety in Numbers A Multi-site Evaluation of Independent Domestic Violence Advisor Services* London: Henry Smith Charity, 2009.

⁷⁷ McLeod R, Philpin C, Sweeting J and Evans R *Court experiences of adults with mental health conditions, learning disabilities and limited mental capacity Report 2: Before Court*, Ministry of Justice Research Series 9/10 London: Ministry of Justice, 2010.

Part III: trauma beyond the 'victim gaze'

We have argued that consciously invoking a 'trauma lens' will highlight significant 'blind-spots' in contemporary criminal justice policy and practice in England and Wales, many of which reduce the potential of initiatives designed to improve victims' experiences or to engage them more effectively as participants. We have suggested that a trauma-informed response would require criminal justice policy-makers and practitioners to acknowledge the prevalence of trauma amongst the victim population, recognise the psychological effects of such trauma, and integrate knowledge about trauma and PTSD into policies, procedures and practices at each stage with the aim of minimising further trauma and promoting recovery.

Of course, it is not only victims in the criminal justice process who experience, or are at risk of experiencing, trauma, and invoking a trauma lens is thus likely to generate broader ramifications for others. While our aim in the discussion above has been to take seriously the government's rhetoric around creating a victim-centred criminal justice system, in order to explore what this would entail if we were to take the prevalence and impact of trauma amongst this constituency more meaningfully into account, PTSD-related symptoms are also prevalent amongst suspects and defendants. Indeed, there is pre-existing evidence that attests to a higher prevalence

amongst offenders when compared to the general population of PTSD and associated symptoms, frequently linked to earlier traumatic life experiences and events.⁷⁸ Though it is beyond the scope of this article to explore the implications of this in detail, as we

⁷⁸ Jordon and colleagues reported that 78% of their sample of incarcerated women had experienced at least one event in their lives that met the DSM criteria for an extreme event with the potential to predispose an individual to PTSD, Jordan B, Schlenger W, Fairbank J, Cadell J Prevalence of Psychiatric Disorders Among Incarcerated Women – Convicted Felons Entering Prison *Archives of General Psychiatry* 1996; 9: 513-519. See also Goff A, Rose E, Rose S, Purves D, Does PTSD occur in sentenced prison populations? A systematic literature review *Criminal Behaviour and Mental Health* 2007; 17: 152–162. High rates of physical and/or sexual abuse histories and PTSD are also reported amongst adult prison populations, Browne A, Miller B, Maguin E, Prevalence and severity of lifetime physical and sexual victimization among incarcerated women *International Journal of Law and Psychiatry* 1999; 22:301–32, Weeks R, Widom C, Self-reports of early childhood victimization among incarcerated adult male felons *Journal of Interpersonal Violence* 1998; 13: 346–361, Powell T, Holt J Fondacaro K, The prevalence of mental illness among inmates in a rural state *Law and Human Behavior* 1997; 21(4):427–438, Teplin L, Abram K, McClelland G, Prevalence of psychiatric disorders among incarcerated women: Pretrial jail detainees. *Archives of General Psychiatry* 1996; 53: 505–512, Zlotnick C. Posttraumatic stress disorder, comorbidity and childhood abuse in incarcerated women *The Journal of Nervous and Mental Disease* 1997;12:761–763, Dutton D, Hart S, Evidence for long-term, specific effects of childhood abuse and neglect on criminal behaviour on men *International Journal of Offender Therapy and Comparative Criminology* 1994; 36: 129-137.

highlight below, there can be little doubt that it raises further questions regarding the ability of those severely affected by trauma and facing criminal charges to provide best evidence, establish credibility and participate effectively in criminal proceedings.

The other side of the coin: traumatised suspects and defendants

Research that focuses directly on the impact of traumatic stress on defendants' experiences of the criminal justice process is limited, but there is every reason to suppose that defendants coping with the debilitating effects of trauma may find the process of giving evidence – should they elect to testify – particularly challenging. Ordinary trial processes may be adapted where deemed necessary to assist a vulnerable defendant to understand and participate in proceedings – including clearing the public gallery, timing evidence and giving breaks to take account of a defendant's ability to concentrate, as well as familiarisation visits to the courtroom before the trial – however, as with vulnerable witnesses and complainants, such assistance depends upon early and appropriate identification of a defendant's potential vulnerability.⁷⁹ With

⁷⁹ The special measures provisions of the YJCEA do not extend to vulnerable defendants attracting criticism of a lack of parity between support for defendants and vulnerable complainants / witnesses. Despite lack of legislation, practice rules make clear that criminal courts should take "every reasonable step to facilitate the participation of any person, including

limited acknowledgement of the prevalence of PTSD amongst suspects / defendants and a lack of clarity regarding responsibility for ensuring special measures or other reasonable adjustments, it seems likely that many defendants who might benefit from measures designed to ease the stress of testifying are missing out on support that would promote more effective participation in proceedings.⁸⁰ Moreover, there is evidence of highly inconsistent practice in relation to the provision of an 'appropriate adult' during interactions with police investigators, which places many vulnerable suspects, who may be experiencing PTSD-related symptoms, at increased risk.⁸¹

A trauma-informed response would place greater emphasis on early identification of suspects and defendants who may be experiencing PTSD and on ensuring measures are in place to assist them in coping with the stress of testifying and broader

the defendant in preparation for trial", in line with the right to a fair trial and that this may include adapting ordinary trial processes, Rule 3.8(4)(b) Criminal Procedure (Amendment) Rules 2012. See also Judicial College, *Equal Treatment Bench Book* London: Judicial College, 2010.

⁸⁰ Lord Bradley, *Bradley Report, Mental Health Problems or Learning Disabilities in the Criminal Justice System* London: Department of Health, 2009. Talbot J, *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* London: Prison Reform Trust, 2012.

⁸¹ Chris B, Bhardwa B, Jacobson J, May T, Webster, R, *There to Help Ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by police* London: National Appropriate Adult Network, 2015.

engagement with the criminal process. As with complainants and other witnesses, it would require police, prosecutors, judges and jurors to become more attuned to the impact of trauma, and in particular its potential effects on recall, so as to ensure a more informed and appropriate evaluation of the credibility of their claims; and it would, again, highlight the weightiness of the implications of factors such as delay and interruption in trial proceedings for traumatised defendants, and especially for those who are remanded in custody. A trauma-informed approach would, moreover, extend beyond the investigation and prosecution process, requiring changes in the prison system and to the processes of resettlement on release.⁸²

Importantly, therefore, whilst some have expressed concern regarding the prioritisation of victims in contemporary criminal justice policy, and its potentially negative impact upon the rights of defendants to a fair trial and / or the impartiality of the state as prosecutor, several of the training and support initiatives required by a trauma-informed approach to victims could, and should, be extended to traumatised suspects and defendants. This would ensure that increased sensitivity, awareness and support is not a 'zero-sum' game. After all, it is in all parties' interests that they are empowered to

⁸² Miller N. A, Najavits L. M. Creating trauma-informed correctional care: A balance of goals and environment *European Journal of Psychotraumatology* 2012; 3: 10.3402/ejpt.v3i0.17246.

provide best evidence, and to participate effectively in criminal proceedings, and that the professional personnel with whom they interact at all stages in the process are appropriately trained, sensitive to the risks of re-traumatisation and open-minded in their evaluation of the narrative accounts provided.

To some extent, the changes in the treatment of victims (as well as suspects and other witnesses) that we have suggested are required in order to take trauma seriously within the criminal justice process are not particularly revolutionary. In many respects, they merely call upon criminal justice personnel to operationalise effectively, and in a timely manner, protocols and processes that have already been acknowledged as best practice - improving the identification of trauma, acknowledging the scale of its impact, and providing appropriate levels of support. Though these initiatives often sit uncomfortably alongside the adversarial dynamics of the criminal process, the need for their introduction to ameliorate the excesses of that process has already been acknowledged, and the claim here is that it needs to be pursued more meaningfully in more cases. By contrast, there is one respect in which application of a trauma-lens poses the prospect of a much more radical challenge to the overall culture of the criminal justice process; namely, by highlighting the scope and threat of vicarious trauma faced by professional participants, and calling for greater acknowledgement of the emotional labour in which police, lawyers and judges (and jurors) are often involved.

Vicarious trauma and criminal justice 'professionalism'

The need to negotiate the emotional consequences of the victimisation stories of 'others' is one that affects all professionals working in the criminal arena, regardless of the fact that it may not always be directly acknowledged or reflected upon. Sagy⁸³ has identified a series of 'psycholegal soft-spots' that can arise where the work undertaken in order to satisfy prevailing legal procedures has negative or positive psychological consequences: first, in meeting the challenge of enabling a complainant to narrate her or her account of victimisation; second, in handling that narrative in a way that avoids re-traumatisation; and third, in acknowledging and responding to the impact upon lawyers and other listeners of hearing the complainant's narrative. Though Sagy sketches these specifically in the context of the asylum sector, there is every reason to expect that they would also be identifiable in the criminal justice arena, and brought to the fore by application of trauma lens.

⁸³ Sagy T, Even Heroes Need to Talk: Psycho-Legal Soft Spots in the Field of Asylum Lawyering Bepress Legal Series paper 1014 <http://law.bepress.com/expresso/eps/1014> (2006, accessed 1 March 2016).

The first two 'soft-spots' speak primarily to the ability of the listener (be that a police officer, prosecutor, defence barrister, judge or juror) to be aware of, and sensitive to, the witness's emotional state, which may be prompted by a range of often interwoven factors, including displaying PTSD-related symptoms in the wake of the alleged victimisation; and we have explored in the sections above some of the current obstacles within the criminal justice process that may diminish the prospects for such trauma-informed handling and evaluation of resultant accounts. In this section, we turn attention briefly to the third of Sagy's 'soft-spots,' which engages the question of the contagion of victim's emotions for professionals (and jurors) in the criminal justice context. Naturally, where the listener believes the narrative, this can heighten its emotional impact, but there is a significant degree to which – irrespective of whether the account is ultimately adjudged to be credible – encountering and / or having to elicit further details of violence and victimisation, especially when on a recurring basis, can take an emotional toll. Though barely acknowledged as an issue, let alone a source of concern, in contemporary criminal justice policy in the UK, this porosity of human engagement places personnel at risk of experiencing 'vicarious trauma,'⁸⁴ which can include symptoms similar to those associated with PTSD, such as re-experiencing the event witnessed or narrated, avoidance of recollection of the event witnessed or

⁸⁴ Chamberlain J, Miller M, Stress in the Courtroom: Call for Research *Psychiatry, Psychology and Law* 2008; 15: 237-250, Richardson J, *Guidebook on Vicarious Trauma: Recommended Solutions for Anti-Violence Workers* (2001).

narrated, and emotional 'numbness'.⁸⁵ Such vicarious trauma is also often closely associated with the experience of 'burn-out,' whereby "a pattern of emotional overload"⁸⁶ – generated by consistent exposure to traumatic material⁸⁷ and / or "conflict between individual values and organisations goals or demands, an overload of responsibilities, a sense of having no control over the quality of services provided"⁸⁸ - results in symptoms such as fatigue, irritability, hopelessness and a decline in performance.

Pre-existing studies, though relatively limited in number, have exposed a significant correlation between the incidence of vicarious trauma / burn-out and acting as a key participant in legal advocacy or adjudication, particularly where narratives of inter-

⁸⁵ C Figley, 'Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview' in *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorders in Those who Treat the Traumatized*, ed. C. Figley (1995) 1-20.

⁸⁶ Maslach C, *Burn-out: The Cost of Caring* Malor Books, 2011, p3.

⁸⁷ Aguilera D, *Crisis Intervention: Theory and Methodology* St Louis: Mosby, 1995.

⁸⁸ Salston M, Figley C, Secondary Traumatic Stress Effects of Working with Survivors of Criminal Victimization *Journal of Traumatic Stress* 2003; 16: 167-174, at 168; Maslach C, Leiter M, *The Truth about Burnout* (1997); Farber B, *Crisis in Education: Stress and Burnout in the American Teacher* Proquest Info & Learning, 1991.

personal violence are prevalent.⁸⁹ Zimmerman, having conducted interviews with 56 Canadian judges, outlined what he described as the “torment” they experienced in dealing with cases of sexual abuse, child maltreatment and domestic violence.⁹⁰ Building on this, Jaffe and colleagues’ research with 105 judges involved in a range of criminal, civil and juvenile court adjudication, found that 63% suffered one or more symptoms associated with vicarious trauma, including anxiety, fatigue, flashbacks, and a lack of empathy or connection to others.⁹¹ Meanwhile, Levin and Greisberg’s study found that a cohort of US attorneys working with victims of domestic violence and

⁸⁹ Saakvitne K, Pearlman L, *Transforming the Pain: A Workbook on Vicarious Traumatization* (1996); Vrkleviski L, Franklin J, Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material *Traumatology* 2008; 14: 106-118.

⁹⁰ Zimmerman I, *Trauma and Judges*. Presentation to the Canadian Bar Association Annual Meeting, 13th August 2002.

⁹¹ Jaffe P, Crooks C, Dunford-Jackson B, Town M, Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice *Juvenile and Family Court Journal* 2003; 54: 1-9, Chamberlain J, Richardson J, Judicial Stress: A Topic in need of Research in Miller M, Bornstein B, eds. *Stress, Trauma and Wellbeing in the Legal System* Oxford: Oxford University Press, 2013, pp 269-290.

criminal defendants demonstrated significantly higher levels of traumatic stress than professionals engaged in mental health and social service work.⁹²

Adopting a trauma-informed lens in the criminal justice context provides an important opportunity to, first, acknowledge, and then, respond to this complicated process of emotional interaction. While contagion is a risk that faces all who engage with traumatic narratives,⁹³ it has been suggested that it may be particularly significant (and particularly challenging) for legal and bureaucratic professionals, since while “being exposed daily to detailed traumatic narratives is extremely demanding and adds an important emotional dimension”, lawyers and those performing quasi-legal functions such as police and prosecutors are not trained to acknowledge these work-related

⁹² Levin A, Greisberg S, Vicarious Trauma in Attorneys *Pace Law Review* 2003; 24: 245. See also Redd K, Bornstein B, A Stressful Profession: The Experience of Attorneys in Miller M, Bornstein B, eds. *Stress, Trauma and Wellbeing in the Legal System* Oxford: Oxford University Press, 2013, pp 217-244.

⁹³ Baird S, Jenkins S, Vicarious Traumatization, Secondary Traumatic Stress, and Burnout in Sexual Assault and Domestic Violence Agency Staff *Violence and Victims* 2003; 18: 71-86, Felton J, Burnout as a Clinical Entity – Its Importance in Health Care Workers *Occupational Medicine* 1998; 48: 237-250.

emotions, let alone to address the traumatic impact they may have upon them.⁹⁴ Frequently left to manage this emotional labour informally, a variety of personal coping mechanisms have been identified (including physical exercise, socialising with family and friends or the use of alcohol), as have strategic shifts (conscious or otherwise) in work ethic and ethos.⁹⁵ Indeed, previous research focussed on legal and quasi-legal decision-makers within the UK asylum sector has uncovered the use of tactics of detachment, disbelief and denial of responsibility in order to avoid (with varying levels of success) becoming emotionally overwhelmed by the accounts of persecution and violence routinely encountered.⁹⁶ While resort to such tactics reflects an entirely understandable impulse for self-protection, they imperil the prospects for justice in individual cases, potentially reducing police and prosecutors' willingness to engage in detail with harrowing narratives provided by complainants, encouraging a perception of

⁹⁴ Fischman Y, Secondary Trauma in the Legal Profession, a Clinical Perspective *Torture* 2008; 18: 107-115, at 109.

⁹⁵ For further discussion of how police culture is seen to enable officers to adapt to, and deal with, the emotional demands the role see Reiner R, *The Politics of the Police* 4th Edition, Oxford: Oxford University Press, 2010, Waddington P, Police (Canteen) Subculture: An Appreciation *British Journal of Criminology* 1999; 39: 286-308.

⁹⁶ Baillot H, Cowan S, Munro VE, Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context *Journal of Law and Society* 2013; 40: 509-540.

these narratives as more 'story-like' than 'real', and promoting a cynicism in relation to their veracity that is borne out of organisational / personal 'burn-out' but conveniently reinforces 'just world' hypotheses according to which 'bad things do not happen to good people'.

One of the key consequences of a trauma-informed approach to criminal justice policy, then, would be the recognition of the emotional labour in which its professional participants are inevitably engaged, and the establishment of systems designed to provide more effective, and less potentially maladaptive, support mechanisms. The scale of the challenge in this respect should not be underestimated, however. As Martin et al have argued, organisations have emotional cultures that "consist of language, rituals and meaning systems, including rules about the feelings workers should, and should not, feel and display;" and particularly in an arena in which the rationality and objectivity of 'law' is emphasised, this can solidify "embedded trauma" *within* organisations.⁹⁷ Previous research with criminal lawyers has found that notwithstanding evidence of high levels of subjective distress, depression and stress, only half of respondents had even considered discussing work-related distress with a supervisor, and far less had considered, or sought out, other forms of professional

⁹⁷ Martin P et al, 'Crisis Work: Rape Work – Emotional Dilemmas in Work with Victims' in S. Fineman (ed.) *The Emotional Organisation: Passions and Power* (2008) 44 – 60, at 46

assistance.⁹⁸ Underlying this reluctance is a concern that seeking support for the emotional aspects of one's role within the criminal justice process would be viewed as tantamount to admitting one's inability to be a 'good' (i.e. detached and unemotional) lawyer.⁹⁹

The costs of (lay) participation: jurors and emotional labour

Of course, it is not only those who have been legally trained who are required to engage in emotional labour during the criminal justice process. Bearing the overall responsibility for verdict decision-making places a heavy burden upon jurors; and the stress associated with this may be compounded by being exposed to harrowing verbal testimony, gruesome evidence exhibits, and (what may be perceived by lay observers to be) antagonistic cross-examination of complainants.¹⁰⁰ Whilst jurors generally report

⁹⁸ Vrkleviski L, Franklin J, Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material *Traumatology* 2008; 14: 106-118.

⁹⁹ Bandes, S. Repression and Denial in Criminal Lawyering (2006) 9 *Buffalo Criminal Law Review* 339 - 390, at 342; see also Harris A & Schultz M. A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education (1993) 45 *Stanford Law Review* 1773 –1805.

¹⁰⁰ Bornstein B, Miller M, Nemeth R, Page G, Musil S, Juror Reactions to Juror Duty; Perceptions of the System and Potential Stressors *Behavioral Sciences and the Law* 2005; 23:

being satisfied with their experience of being a juror, the available research also suggests that jury service can be a significant source of anxiety for some and that, for a minority (particularly where they have experienced personal victimisation or exhibit other forms of vulnerability), it can engender moderate to severe clinical levels of stress, and in the longer term, may lead to symptoms associated with PTSD.¹⁰¹ Despite this, it is striking that there is almost no support made available to prepare jurors for undertaking their role or for helping them to work through any emotional or psychological distress that they may experience as a consequence. Jurors are often wholly ill-prepared for the emotional labour in which they will be required to engage, and the associated stress is unlikely to be appeased by the marked absence of guidance provided to them in regards to how to approach their deliberative task, individually or collectively. Moreover, they are precluded – by law – from discussing their thoughts and feelings with others, both during and after the trial, which prevents the opportunity for effective ‘debriefing’, and can lead to additional feelings of isolation and anxiety.

321-346. et al 2005 Kaplan, S, Winget, C, The occupational hazards of jury duty *Bulletin of the American Academy of Psychiatry and the Law* 1992; 20: 325–33, Miller M, Bornstein B, The Experience of jurors: Reducing Stress and Enhancing Satisfaction in Miller M, Bornstein B, eds. *Stress, Trauma and Wellbeing in the Legal System* Oxford: Oxford University Press, 2013, pp247-267.

¹⁰¹ Robertson N, Davies G, Nettleingham A, Vicarious Traumatization as a Consequence of Jury Service *The Howard Journal of Criminal Justice* 2009; 48: 1–12.

Applying a trauma informed lens in this context highlights the difficulties that this presents – both in terms of the prospects for justice, since undue levels of distress amongst jurors may impair their ability to make an effective and accurate decision, and in terms of the broader ethics of how lay participants are used (both descriptively and pejoratively) within the criminal justice process. What is more, it adds urgency to the case for introducing measures that reduce the risk of traumatisation for jurors; whether this be through a screening process that identifies and eliminates from the jury pool those individuals who are most vulnerable to potentially traumatic material or through the deliberate provision of more extensive preparation and debriefing programmes. In this latter respect, one potential avenue, for example, would be the creation of support for jurors at Crown Courts, akin to that now available for vulnerable witnesses, under the auspices of which jurors troubled by the emotional dimensions of their role could discuss this with trained staff, whilst retaining the privileges engendered by a shared and binding legal oath of confidentiality.¹⁰²

Concluding remarks

¹⁰² Robertson N, Davies G, Nettleingham A, Vicarious Traumatisation as a Consequence of Jury Service *The Howard Journal of Criminal Justice* 2009; 48: 1–12.

While it cannot be disputed that support for victims of crime has progressed significantly within the last two decades, it is also clear that any claim that their needs and interests are now at the heart of the criminal justice system is a step too far. A genuinely victim-centred criminal justice process would – amongst other things - be one that acknowledges the extent of crime's emotional and psychological impact and, as far as possible, develops procedures and practices with the goal of increasing the effectiveness of interactions with traumatised victims, avoiding their re-traumatization, and facilitating, or at least not undermining, their recovery. Though recent initiatives designed to ease the process of evidence-giving and / or to temper the confrontational tone of cross-examination have certainly offered some improvement, they very much represent the beginning and not the end of a process of taking trauma seriously. Far more needs to be done to train criminal justice professionals on effective identification and first-response handling of traumatised complainants (and suspects) and to improve their understanding of the effects of trauma, including on memory and narration. Evidence-based, individually responsive and operationally effective procedures must be implemented to support traumatised complainants throughout the process, which should involve multi-agency coordination (mental health services, social services, housing, and so on) and extend to ensuring timely access to therapeutic treatment. Moreover, the ways in which criminal justice professionals and jurors are affected by their engagement with the traumatic narratives of others, as well as by their role as arbiters in their resolution, bears far greater recognition and reflection; and strategies

for coping with such emotional labour, at both the individual and organisational level, must be promoted.

It is important, of course, not to underestimate the scale of this challenge. Taking trauma seriously would require not only significant political will and substantial investment of funds, but also a considerable shift in the cultural norms and organisational values that are entrenched within the criminal justice process in England and Wales. In the final analysis, it may be impossible to fully embed a trauma-informed response within the broader structures of our adversarial process, but the fact that some in-roads have been made which acknowledge the need to ameliorate its excesses, at least when it comes to vulnerable and intimidated witnesses, is significant. We have argued in this article that there are compelling reasons in terms of fairness, equality and professional ethics for applying a trauma lens to how complainants are treated. While we would hope that these would be the primary drivers for criminal justice reform, it is perhaps worth pointing out that there are a number of more instrumental motivations that may also be influential – attending more empathetically to the psychological needs of victims is, after all, likely to promote more effective interviewing, give access to better quality evidence and increase the chances of support for a prosecution, whilst encouraging more victims to report. In addition, in times of austerity, acknowledging crime-related trauma as a major public health (as well as safety and security) issue provides an additional lever for funding and positions

crime reduction as a legitimate public health priority.¹⁰³ Such an approach also draws into the frame the many victims of crime who never report to the police, but who may nonetheless require assistance if they are to rebuild their lives and overcome the effects of trauma linked to their victimisation. In so doing, it highlights the extent to which it is incumbent on any Government which purports to be 'victim- focused' to pursue policies that reduce the impact of crime on individuals, regardless of whether a suspect is identified, charged or prosecuted, as well as to ensure that *all* victims, whether or not they officially report an offence, are respected and supported.¹⁰⁴

¹⁰³ HM Government, *No Health without Mental Health: A cross-government mental health outcomes strategy for people of all ages* London: Department of Health, 2011. See also, Bellis M, Hughes K, Perkins C, Bennett A, *Protecting People Promoting Health: a Public Health Approach to Violence Protection for England* Liverpool: Department of Health 2012; and in the US context, Jennings W, Gover A, Piquero A, Integrating the American Criminal Justice and Mental Health Service Systems to Focus on Victimization *International Journal of Offender Therapy and Comparative Criminology* 2011; 55: 1272-1290.

¹⁰⁴ Victim Support, *Criminal Neglect: No Justice Beyond Criminal Justice* London: Victim Support, 2002. The Royal College of Psychiatrists has notably issued a position statement which calls for guidance which defines and promotes a care pathway for victims of violent crime across all relevant agencies to improve mental health outcomes for this population, Shepherd J, Bisson J, *Managing the impact of violence on mental health, including among witnesses and those affected by homicide* London: Royal College of Psychiatrists, 2012.

